should be overruled, because the instruction fixed a proper standard of care and skill. *Krinard v. Westerman* (1919, Mo.) 216 S. W. 938.

The degree of care and skill required of physicians and surgeons is not the highest possible, but only that which is reasonable and ordinary. *Howard v. Grover* (1848) 28 Me. 97, 48 Am. Dec. 478. Without a special contract they can never be considered as warranting or insuring a cure. *Craig v. Chambers* (1867) 17 Oh. St. 253. That no cure was effected does not raise a presumption of negligence. *Dye v. Corbin* (1906) 59 W. Va. 266, 53 S. E. 147. Nor does an honest mistake or error of judgment in cases of reasonable doubt and uncertainty operate to place physicians and surgeons under a duty to pay damages. *Leighton v. Sargent* (1853) 27 N. H. 460, 59 Am. Dec. 388. But such a duty does arise if injury results from the want of skill as well as from negligence in the application of skill. *Long v. Morrison* (1860 14 Ind. 595, 77 Am. Dec. 72. In determining the standard of care and skill which the law requires, the state of scientific knowledge at the time must be considered. *Bigney v. Fisher* (1904) 26 R. I. 402, 59 Atl. 72; *Kalloch v. Hoagland* (1917, C. C. A. 6th) 239 Fed. 252. The doctrines of his school must also be regarded, if the defendant belongs to one of a number of distinct and differing schools of practice. *Ennis v. Banks* (1917) 95 Wash. 513, 164 Pac. 58 (allopath); *Spead v. Tomlinson* (1904) 73 N. H. 46, 59 Atl. 376 (christian science healer). Within these limitations, the authorities are split on what constitutes ordinary and reasonable care. According to what appears to be the better view it is such care and skill as is possessed generally by members of the profession in similar localities. *Dorris v. Warford* (1907) 124 Ky. 768, 100 S. W. 312. But a respectable number of cases hold that the test is what is ordinary and reasonable care in the same locality or vicinity. *Hesler v. California Hospital Co.* (1918) 178 Calif. 764, 174 Pac. 654; *DeBruine v. Voskuil* (1918) 168 Wis. 104, 169 N. W. 288. The objection to the latter doctrine is that it does not furnish a fair criterion where the medical profession of the particular neighborhood in question is below the average in knowledge, skill, or care. The principal case seems sound in taking the former view and fixing the degree of care as that used "under like circumstances."

PLEADING—LIMITATION OF ACTIONS—AMENDMENTS STATING NEW CAUSE OF ACTION.—The plaintiff brought an action based on a statute for personal injuries. His original petition was filed within the statutory period and alleged ultimate facts which showed that he was engaged in interstate commerce at the time of the injury. After the statutory period had expired, the plaintiff was allowed to amend so as to state a cause of action under the federal Employer's Liability Act. The defendant then moved to strike the amendment upon the ground that it stated a new cause of action, which was barred by the statute of limitations. *Held,* that this motion should be overruled, because the amendment only amplified the allegations of the original petition. *Lammers v. Chicago Great Western Ry.* (1919, Iowa) 175 N. W. 311.

It is generally conceded that an amendment will be considered as filed when the original petition was filed unless a new cause of action is stated. *Birmingham Ry. L. & P. Co. v. Jung* (1909) 161 Ala. 461, 49 So. 434; *United States v. McCord* (1914) 233 U. S. 157, 34 Sup. Ct. 550. But the courts are in hopeless confusion as to when a new cause of action is stated. The majority hold that an amendment states a new cause of action, when it changes the basis of the action from a common-law to a statutory liability, or *vice versa. Union Pacific Ry. v. Wyler* (1895) 158 U. S. 285, 15 Sup. Ct. 877; *Allen v. Tuscarora Valley Ry.* (1910) 229 Pa. 97, 78 Atl. 34. A minority hold that an amendment which shifts from a legal to an equitable remedy, or from tort to contract,

states a new cause of action. *Hackett v. Bank of Calif.* (1881) 57 Calif. 335, *Gates v. Paul* (1903) 117 Wis. 170, 94 N. W. 55. See COMMENT (1918) 27 YALE LAW JOURNAL, 1053; *cf.* (1919) 28 *ibid.*, 693. Various other tests have been laid down to determine the identity of the causes of action. Would the same evidence support both of the pleadings? *Scoville v. Glasner* (1883) 79 Mo. 449; *Whalen v. Gordon* (1899, C. C. A. 8th) 95 Fed. 305. Is the measure of damages the same in each case? *Hurst v. Detroit City Ry.* (1891) 84 Mich. 539, 48 N. W. 44. Are the allegations of each subject to the same defences? *Goddard v. Perkins* (1838) 9 N. H. 488; *Phoenix Lumber Co. v. Houston Water Co.* (1901) 94 Tex. 456, 61 S. W. 707. All of the above suggested *criteria* seem to deal with the method of stating the cause of action rather than with the underlying substantive right. It would seem that the test which has the proper basis is whether or not a judgment upon the original pleading would bar an action upon the amendment, or *vice versa*. *Reheme v. Clinton* (1879) 2 Utah, 230; *Van Patten v. Waugh* (1904) 122 Iowa, 302, 98 N. W. 119. It is submitted that the sole inquiry should be whether or not the plaintiff, in his amendment, is still seeking redress for the violation of the same primary right set out in his original petition. Using this as a test the result reached in the instant case is clearly correct.

PROPERTY—SURFACE WATERS—OBSTRUCTION OF NATURAL FLOW.—The plaintiff and the defendant owned adjoining tracts of land. The plaintiff brought an action for alleged damages to his crops caused by the erection of an embankment on the defendant's land, whereby the surface water, which would naturally flow upon the land of the defendant, was sent back to the plaintiff's land. *Held*, that he should not recover. *Johnson v. Leazenby* (1919, Mo.) 216 S. W. 49.

Some courts, applying what is called the civil-law theory, hold that the lower owner is under a duty to receive surface water in its natural flow. *Shaw v. Town of Sebastopol* (1911) 159 Calif. 623, 115 Pac. 213; *Hoehn v. East Side Levee & Sanitary District* (1916, Sup. Ct.) 203 Ill. App. 48; *City Dairy Co. v. Scott* (1916) 129 Md. 548, 100 Atl. 295; *Crane v. Valley Land Co.* (1918, Mich.) 169 N. W. 18. The *real* common-law rule is the same as the civil-law rule. *Ewart v. Cochrane* (1861, H. L.) 4 Macq. 117; *Beer v. Stroud* (1890) 19 Ont. Rep. 10; see 3 Farnham, *The Law of Waters and Water Rights* (1904) sec. 889b. But other courts, as was done in the instant case, apply, under the misnomer of the "common-law" theory, the common-enemy rule. *Barkley v. Wilcox* (1881) 86 N. Y. 140, 40 Am. Rep. 519; *Gibson v. Duncan* (1915) 17 Ariz. 329, 152 Pac. 856; *Rutkoski v. Zalaski* (1916) 90 Conn. 108, 96 Atl. 365. That rule is that the lower owner has the privilege of building embankments to ward off water or filling and grading his land, regardless of the consequences to the property of the upper proprietor. *Walther v. Cape Girardeau* (1912) 166 Mo. App. 467, 149 S. W. 36; *Louisville N. O. & T. R. R. v. Jackson* (1916) 123 Ark. 1, 184 S. W. 450. There are some jurisdictions which make the reasonableness of the use the basis of determining whether or not the lower owner may obstruct surface waters. *Swett v. Cutts* (1870) 50 N. H. 439, 9 Am. Rep. 276; *Peterson v. Lundquist* (1908) 106 Minn. 339, 119 N. W. 50; see COMMENT (1902) 12 YALE LAW JOURNAL, 41. Still other authorities have suggested that the court in applying any of the rules should distinguish between rural and city property. *Cf. Levy v. Nash* (1908) 87 Ark. 41, 112 S. W. 173, 20 L. R. A. (N. S.) 155, note.

QUASI-CONTRACTS—CARRIAGE OF THE MAIL BY RAILROAD.—The plaintiff sued the United States to recover a balance claimed to be due for carrying mail through a series of years, basing its claim upon an implied contract arising from the fact that, having been compelled to carry the mail, its property had been taken